United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

74-2483

B
Pgs
6

To be argued by
SAMUEL ZUCKERMAN

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

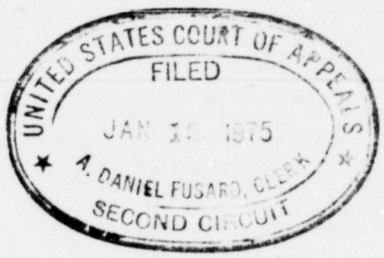
- against -

ALLEYNE F. ROBINSON, JOSE ANTONIO ACOSTA ALVAREZ, a/k/a JOSE ANTONIO, a/k/a JOSE ACOSTA and JOSEPH M. VILLEGAS,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR DEFENDANT-APPELLANT, ALLEYNE F. ROBINSON



SAMUEL ZUCKERMAN
Attorney for Defendant-Appellant, Alleyne F. Robinson
570 Seventh Avenue
New York, New York 10036
(212) WI 7-4080

(7954) LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing

South River, N. J. (201) 257-6850 | New York, N. Y. (212) 565-6377 | Philadelphia, Pa. (215) 563-5587 | Washington, D. C. (202) 783-7288

1

TABLE OF CONTENTS

Page

Statement 1

Statement of the Facts 2

Questions Presented 3

Argument:

Point I. Neither the indictment nor the evidence adduced at the trial established that Alvarez or Robinson violated a Federal Statute. Accordingly the District Court had no jurisdiction and the indictment should have been dismissed. 4

Point II. The indictment should have been dismissed because of undue prejudicial delay. 13

Point III. The witnesses who testified for the Government regarding illicit payments were accomplices as a matter of law and the Court's denial of defendant Robinson's request to so charge was erroneous and prejudicial. 14

Point IV. The interpretation making it a federal crime to violate § 501 to convert blank membership form applications having little or no intrinsic value is not a reasonable interpretation of that law and accordingly violates ~~Alvarez's~~ Alvarez' constitutional protection of due process of law. . . . 14

Contents

Page

Conclusion 17

TABLE OF CITATIONS

Cases Cited:

Bently v. Mountain, 51 Cal. app.2d 95, 124 P.2d 91 . . . . . 8, 10

Chappell v. United States, 360 P.2d 764 . . 9, 11

Cline v. Frink Dairy Co., 274 U.S. 445, 459, 47 S. Ct. 681, 685, 71 L. Ed. 1146 . . 16

Colella v. United States, 360 F.2d 792 . . . 8

Collins v. Commonwealth of Kentucky, 234 U.S. 634 16

Dawkins v. National Liberty Life Ins. Co., 263 F. Supp. 8, 11

Genslinger v. New Illinois Athletic Club, 339 Ill. 426, 171 N.E. 514 . . . . . 8, 10

Guarnaccia v. Kennin, 234 F. Supp 429 . . 7

Gurton v. Arons, 399 F.2d 371 . . . . . 4, 5

Hogaboom v. State, 234 N.W. 422 10

Contents

Page

Holdeman v. Sheldon, 204 F. Supp. 890 (S.D.N.Y.) aff'd, 311 F.2d (2d Cir 1962) . 7

International Harvester Co. of America v. Commonwealth of Kentucky, 234 U.S. 216 16

Klein v. Burke Const. Co., 260 U.S. 226 . . 4

McBoyle v. United States, 283 U.S. 25-27 51 S. Ct. 340, 75 L. Ed. 816 16

McClung v. Thompson, 401 F.2d 253 8

Metropolitan Life Ins. Co. v. San Francisco Bank, 136 P.2d 853 . . . . . 8, 11

Nash v. United States, 229 U.S. 373, 33 S. Ct. 780, 57 L. Ed. 1232 16

Pearson v. Dodd, 410 F.2d 701 . . . . . 8, 9

People v. Grogan, 269 N.Y. 138, 148 . . . 17

People v. Hayes, 365 Ill. 318 . . . . . 9, 10, 11

State v. Tauscher, 360 P.2d 764 . . . . 9, 10, 11

United States v. Brewer, 139 U.S. 278, 288 11 S. Ct. 538, 541, 85 L. Ed. 190 16

Contents

Page

United States v. [L.] Cohen Grocery Co., 255 U.S. 81, 92, 41 S. Ct. 298, 301, 65 L. Ed. 516, 14 A.L.R. 1045 17

United States v. Debrizze, 393 F.2d 642 . . 8

United States v. Mott, 1 Mclean 499, p.504 . 9

United States v. Silverman, 430 F.2d 106 . . 8

Statutes Cited:

1959 U.S. Code Congressional and Administrative News, P. 2321, 2432 7

Title 29 U.S.C. §501(c) 1, 2, 3, 4, 5, 7, 14, 17, 18

Title 18 U.S.C. §2 . . . . . 1, 2, 17

Title 18 U.S.C. §371 . . . . . 1, 2, 17

Title 18 U.S.C. §641 11

Other Authorities Cited:

2 Whartons Criminal Law and Procedure, 227 Sec. 536 9

26 Am. Jur. 2d 12; Law of Crimes, Sec. 12.20, p. 905 (Clark & Marshal 7th ed. 1967) 9

Contents

Page

89 C.J.S. 543 Trover and Conversion, Section 33 8

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

UNITED STATES OF AMERICA,

Appellee,

-against-

ALLEYNE F. ROBINSON,
JOSE ANTONIO ACOSTA ALVAREZ,
a/k/a JOSE ANTONIO, a/k/a
JOSE ACOSTA and
JOSEPH M. VILLEGAS,

Defendants-Appellants.

- x

BRIEF OF DEFENDANT-APPELLANT ALLEYNE F. ROBINSON

STATEMENT

The defendant Robinson appeals from a judgment convicting him of ten counts in the indictment, charging a conspiracy to violate Title 29 U.S.C. § 501(c) and Title 18 U.S.C. §§ 2. and 371. That pursuant to the conspiracy defendants would willfully and knowingly, directly and indirectly embezzle, steal and convert to their use "monies, funds, security, property and other assets of the National Maritime Union (hereinafter N.M.U.) to wit, . . .Group 1 applications and classification document".

Among the means whereby defendants would and did carry out the conspiracy was that the defendants "would and did receive money to falsely obtain Group 1 National Maritime Union classification documents for individuals who did not qualify as Group 1 National Maritime Union members."

THE STATUTES INVOLVED:
18 U.S.C. § 2;
18 U.S.C. § 371 and
29 U.S.C. § 501(c)

STATEMENT OF THE FACTS

The convictions herein are based upon the uncorroborated testimony of persons who admittedly committed the acts of impropriety with conscious knowledge, that they were trying to get a group classification to which they were not entitled. Any and all improprieties were denied by the testimony of defendant Robinson, and of the other defendant, who took the witness stand.

No money or emoluments to which the union was entitled, was withheld from the union. On the contrary, the proof at the trial, and wholly uncontradicted, was to the effect that the union received all monies and emoluments to which it was entitled, upon the issuance

of a group 1 book.

Further details (are referred to and incorporated by reference) are set forth in the Statement of Facts appearing in the brief of the appellant Alvarez, in order to avoid repetition.

QUESTIONS PRESENTED

1. Does the indictment and did the evidence adduced at the trial against Robinson constitute violations of the Federal Statutes so as to make him liable for the crimes for which he was found guilty?

2. Did the Government sustain its burden of proving the defendant Robinson guilty of the offences charged in the indictment?

3. Was the indictment charging Robinson with violation of Title 29 U.S.C. § 501 violative of his constitutional right of due process of law because the section is vague and uncertain as to the acts which defendant is charged to have committed which allegedly violate the laws.

ARGUMENT

POINT I

NEITHER THE INDICTMENT NOR THE EVIDENCE ADDUCED AT THE TRIAL ESTABLISHED THAT ALVAREZ OR ROBINSON VIOLATED A FEDERAL STATUTE. ACCORDINGLY, THE DISTRICT COURT HAD NO JURISDICTION AND THE INDICTMENT SHOULD HAVE BEEN DISMISSED.

The defendants are not charged with embezzling, stealing or converting any funds but rather a few application forms, to be used by seamen for applying for Group 1 membership. The District Court is a Court of limited jurisdiction, and has no jurisdiction over matters not conferred upon it by Statute, (Klein v. Burke Const. Co., 260 U.S. 226, 233, 234) and if Title 29 U.S.C. § 501(c) has no application to the present circumstances, notwithstanding that defendants or any one of them may have performed acts which elsewhere may be denominated as crimes or torts, then there was no jurisdiction for an accusation against such defendants under the act in question. In Gurton v. Arons, 399 F. 2d 371 U.S. Ct. App. 2d Cir., the Court stated:

> "It is equally clear that Section 501 of the L.M.R.D.A. has no application

> to the present controversy. A simple reading of that section shows that it applies to fiduciary responsibility with respect to the money and property of the union and that is not a catch-all provision under which union officials can be based on any ground of misconduct with which the plaintiffs choose to charge them. If further corroboration for this position be needed it will be found in the legislative history and in the law review articles cited by Judge Tenney in his opinion in the district court. 234 F. Supp. at 442-443."

Section 501(c) of Title 29 is but one subsection of Chapter 11 in the Title and which bears the caption LABOR-MANAGEMENT REPORTING AND DISCLOSURE PROCEEDING ACT. This title is referred to in Gurton v. Arons, supra, as L.M.R.D.A.

Subdivision (c), provides and of which each of the defendants are charged with violating, makes it a crime to embezzle, steal or unlawfully and willfully abstract or convert monies, funds, securities, properties or other assets of a labor organization of which he is an officer or by which he is employed, etc.

Patently, none of the defendants embezzled, stole or converted any monies, funds, securities of the union as provided in § 501.

Assuming without conceding that Robinson, acting independently or with assistance of Alvarez did misuse the union's application forms, the fact is that neither of them embezzled, stole or converted any of the union's money. In truth and according to the evidence the union profited by their misdeed. The evidence is uncontroverted that each of the Government's witnesses paid to Robinson the sum of $150, and that some of them, in addition, gave him $30 for quarterly dues. It is not claimed that the union did not receive either the initiation fees or the dues for which each of the witnesses were issued official receipts. Neither was there any evidence that when the Government's witnesses were relieved of their Group 1 books, that the union refunded their initiation fees and their dues or any additional sum as compensatory damages for their being misled. In short, the union profited and therefore the union cannot claim that its property and funds were embezzled.

It is patent that the legislation was not designed or intended to apply to intangible property of nominal value, i.e., a few blank forms that lay about throughout the union hall and was available to anyone regardless of

whether he required them or not.

In Guarnaccia v. Kennin, 234 F. Supp. 429, Mr. Justice Tenney of this Court stated (page 443):

> "More important, however, is the fact that plaintiffs have not cited, nor has the Court been able to find, a decision under Section 501 which involved an alleged breach of duty in respect to matters other than finances. Thus, for example, Holdeman v. Sheldon, 204 F. Supp. 890 (S.D.N.Y.) aff'd, 311 F. 2d (2d Cir. 1962) cited by plaintiffs, involved a suit arising out of the issuance of checks and expenditure of certain funds."

In 1959 U.S. Code, Congressional and Administrative News under S.R. 187 at page 2321 the proponents of the legislation stated the purpose of the bill (and referring to § 501 (a)) was to "provide criminal penalties for embezzlement, conversion of Union funds". Simultaneously the House of Representatives in its report on the bill H.R. 741 at page 2432 stated "Section 501(c) would create a new Federal crime of embezzlement of any funds of a labor organization".

The courts, being cognizant of congressional intent, have consistently held that Section 501(c) was designed to deal with the "taking" of Union funds.

United States v. Silverman, 430 F. 2d 106 2d Cir. p. 114. ("Section 501(c) is read as requiring an intent to deprive the Union of the use of funds and either a lack of Union benefit from the expenditure or a lack of proper authorization for the expenditure." (Emphasis added.)

United States v. Debrizze, 393 F.2d 642 (2d Cir.) at p. 644. ("Before a violation of 29 U.S.C. 501(c) can be made out, it must be shown that the person charged with the violation has unlawfully and wilfully abstracted or converted to his own use or the use of another, the funds of the Union.") (Emphasis added.)

Colella v. United States, 360 F.2d 792 at p. 799. ("Section 501(c) establishes a new Federal crime of embezzlement of any funds of a labor organization.") (Emphasis added.)

Throughout the United States, jurisdictions have uniformly held that property cannot be converted unless it has "value". Pearson v. Dodd, 410 F.2d 701 (D.C. Cir. 1969), cert. denied 89 S. Ct. 2021; McClung v. Thompson 401 F.2d 253 (8th Cir., 1968); Dawkins v. National Liberty Insurance Co. 263 F.Supp. 119 (D.C. S.C. 1967); Metropolitan Life Insurance Company v. San Francisco Bank 136 P.2d 853 (Dist Ct. of Appeal, Cal. 1943); Bently v. Mountain 51 Cal app. 2d 95, 124 P.2d 91; Genslinger v. New Illinois Athletic Club 339 111.426, 171 N.E. 514; 89 C.J.S. 543 Trover and Conversion, section 33.*

*"Trover cannot be maintained for the conversion of any kind of property unless it is shown that it was of some value."

While Federal Courts have had relatively few opportunities to discuss the value doctrine of the law of conversion, that principle of law was reaffirmed by the Court of Appeals for the District of Columbia in Pearson v. Dodd, Supra. In that case, the employees of Senator Thomas J. Dodd, at the instance of Washington columnist Drew Pearson, surreptitiously removed files from Dodd's office and delivered them to Pearson. Pearson photostated the contents of the files and then returned them intact to the Senator's office. In reversing the District Court, the Court of Appeals in an opinion by Judge J. Skelly Wright, found that no conversion had taken place as the contents of the files had no value.

Embezzlement, being a form of conversion, jurisdictions across the country generally hold that property without "value" is incapable of being embezzled. 26 Am. Jur. 2d 12; Treatise on the Law of Crimes, sec. 12.20 at p. 905 (Clark and Marshal 7th ed. 1967); 2 Whartons Criminal Law and Procedure 227, Sec. 536; United States v. Mott 1 McLean 499 at p. 504 (7th cir. 1839); Chappell v. United States 270 F.2d 274 (9th cir. 1959); State v. Tauscher 360 P.2d 764 (Sup.Ct. Oreg., 1961); People v.

Hayes 365 Ill. 318, 6N.E.2d 645; Hogaboom v. State 234 N.W. 422 (S.Ct. Neb. 1931).

The property allegedly "taken" in violation of section 501(c) to wit, National Maritime Union Group I application forms and classification documents, had no intrinsic value and could not be converted or embezzled. State v. Tauscher, Supra; People v. Hayes, Supra; Bentley v. Mountain, Supra, * Genslinger v. New Illinois Athletic Club, Supra. **

The applicability of the value doctrine is readily apparent with respect to the Group I application forms as they could be picked up free of charge at any N.M.U. union hall, where they lay strewn about. To contend that they were converted or embezzled is no less absurd than an assertion that an ineligible senior citizen who picked up a few medicare applications from a stack of forms piled up in tne waiting room of a Social Security Administration Office, "converted" or "embezzled" said applications.

Similarly, the classification documents as chattels

---

* It was held that Union Beauty Shop Cards could not be converted in the absence of some showing that the cards had any value.

** Club membership certificates not being transferable had no value and could not be converted.

had no value and were incapable of being converted or embezzled. They were neither transferable nor negotiable and had no value on the open market. State v. Tauscher, Supra. Moreover, the privileges which such documents may represent are intangibles which cannot be the subject of conversion or embezzlement. Chappell v. United States Supra;* Dawkins v. National Liberty Life Insurance Co., Supra at P. 121; ** People v. Hayes, Supra; McClung v. Thompson, Supra; Metropolitan Life Insurance Company v. San Francisco Bank et al., Supra.

The application of section 501(c) to the facts of this case extends Federal Jurisdiction to an area where it should not be and creates a dangerous precedent. A union employee or official could be prosecuted under the Statute for taking home from union headquarters such trivial items as a box of rubberbands, a ream of paper,

---

* That case held that labor and services were intangibles and could not be embezzled under 18 U.S.C. 641 which forbade embezzlement of United States property.

** "Money may be the subject of conversion, but Trover will not lie to enforce a mere obligation to pay money." Dawkins v. National Liberty Life Insurance Co., Supra at P. 121.

a few paper clips or some envelopes. One can readily see the potential for prosecutorial abuse, especially where the particular union official is controversial or unpopular.

Since the defendants are not charged with unlawfully extorting money from seamen but rather for the illicit use of union application forms, a rather novel crime is advanced. The union does not claim that these applications had any intrinsic value and since the union did in fact derive substantial monetary profit by their use which it never returned, it cannot be claimed that the union therefore suffered a pecuniary loss or damage.

POINT II

THAT INDICTMENT SHOULD HAVE BEEN DISMISSED BECAUSE OF UNDUE PREJUDICIAL DELAY.

At the end of the government's case, defendant Robinson, amongst other grounds moved to dismiss the indictment, because of undue and prejudicial delay (536).

Practically all the information in this prosecution was in the hands of the F.B.I. thru statements given to it by the witnesses in 1970. Nevertheless, the indictment herein did not take place until just before the summer vacation of 1974 (536).

Manifestly, the defendants were prejudiced by reason of difficulty of recall, inability to properly prepare for trial and other matters too numerous to mention.

Thus the unfairness of the government's part leads to a deprivation of defendants' rights and the indictment should have been dismissed.

POINT III

THE WITNESSES WHO TESTIFIED FOR THE GOVERNMENT REGARDING ILLICIT PAYMENTS WERE ACCOMPLICES AS A MATTER OF LAW AND THE COURT'S DENIAL OF DEFENDANT ROBINSON'S REQUEST TO SO CHARGE WAS ERRONEOUS AND PREJUDICIAL.

The Court was requested by defendant Robinson to charge as a matter of law that the witnesses who testified regarding illicit payments were accomplices. The denial thereof by the Court was reversible error and prejudicial to defendant Robinson.

POINT IV

THE INTERPRETATION MAKING IT A FEDERAL CRIME TO VIOLATE § 501 TO CONVERT BLANK MEMBERSHIP FORM APPLICATIONS HAVING LITTLE OR NO INTRINSIC VALUE IS NOT A REASONABLE INTERPRETATION OF THAT LAW AND ACCORDINGLY VIOLATES ROBINSON'S CONSTITUTIONAL PROTECTION OF DUE PROCESS OF LAW.

A reading of Chapter 11 of Title 29 and § 501 thereof, clearly indicates that it was intended to have application to substantive matters involving union finances and it so appears to have been Congress's understanding.

In the Court below the attorneys exhaustively researched the question. At one point at a conference

between the Court and the attorneys the following colloquy occurred which indicated that this was an unusual case:

> "Mr. Rosenbaum: I think this is a case of first impression.
>
> The Court: It isn't as clear as crystal to me. I will do some research on this, too, between now and Thursday. My inclination would be to put it to the jury, with the right to you gentlemen to make motions on papers afterwards, if they are convicted and sentenced.
>
> But I want to do a little research on it because I think there is a real problem. I think you have covered it. I think I have got a memo from you.
>
> Mr. Kingham: I don't believe so. I have a memo I prepared. If your Honor recalls my argument against the Rule 29 motions on conversion. I'd like to hand up the memo at this time and perhaps as an interim measure, and in the interim, I will also research the problem and perhaps give you something additional.
>
> The Court: If you will give me it tomorrow, I will be grateful. Serve it on counsel. This is a little different from the usual case of this kind.
>
> Mr. Kingham: It is indeed, your Honor. And we probably will have to review Mr. Rosenbaum's statement. It is certainly first impression in this district."

Given the state of uncertainty of the trial judge and the Governmental attorney as well as defendants' counsel as to the intention of the law, its interpretation admittedly takes on esoteric proportions.

It is a well recognized principle of law that a statute which either forbids or requires the performance of a certain act in language so vague that men of common experience and intellect must necessarily guess at its meaning, and among them may differ as to its application, violates the first essential of due process of law (International Harvester Co. of America v. Commonwealth of Kentucky, 234 U.S. 216; Collins v. Commonwealth of Kentucky, 234 U.S. 634).

> ". . . 'Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid.' United States v. Brewer, 139 U.S. 278, 288, 11 S.Ct. 538, 541, 85 L.Ed. 190; Nash v. United States, 229 U.S. 373, 33 S. Ct. 780, 57 L.Ed. 1232; International Harvester Co. v. Kentucky, 234 U.S. 216, 34 S.Ct. 853, 58 L.Ed. 1284; McBoyle v. United States, 283 U.S. 25-27, 51 S.Ct. 340, 75 L.Ed. 816; Cline v. Frink Dairy Co., 274 U.S. 445, 459, 47 S.Ct. 681, 685, 71 L.Ed. 1146. In the latter case Chief Justice Taft said 'generally that

> the decisions of the court upholding statutes as sufficiently certain, rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to *correctly apply them, * * * or a well-settled commonlaw meaning, notwithstanding an element of degree in the definition as to which estimates might differ, * * * or, as broadly stated by Mr. Chief Justice White in United States v. [L.] Cohen Grocery Co., 255 U.S. 81, 92, 41 S.Ct. 298, 301, 65 L.Ed. 516, 14 A. L. R. 1045, that for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded.'. . . ."
> (People v. Grogan 267 N.Y. 138, 145).

CONCLUSION

The judgment of conviction of defendant Robinson, should be vacated and the indictment dismissed because:

a) The indictment does not state a criminal violation of Title 18 U.S.C. and § 2 and § 371 and 29 U.S.C. § 501(c).

b) No evidence was adduced at the trial to sustain the verdict against the defendant Robinson either as a principal, aider and abettor or as a conspirator.

c) Section 501(c) of 29 U.S.C. is so vague and indefinite as to the facts under which defendant was indicted so that defendant could not reasonably know that his acts would violate this section and according to that extent, § 501(c) is unconstitutional.

Respectfully submitted,

SAMUEL ZUCKERMAN
Attorney for Defendant-Appellant
Robinson

A 202 Affidavit of Personal Service of Papers H LUTZ APPELLATE PRINTERS INC.

UNITED STATES COURT OF APPEALS:2nd CIRCUIT

Index No.

UNITED STATES OF AMERICA,

Appellee,

against

ALLEYNE F. ROBINSON, et al,

Defendants-Appellants.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, James Steele, being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

250 West 146th Street, New York, New York

That on the 13th day of January 1975 at *

deponent served the annexed Brief for Defendant Rpbinson upon

**

the attorneys in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

James Steele

Print name beneath signature

JAMES STEELE

Sworn to before me, this 13th day of January 1975

Robert T. Brin

** * 8 Robert J. Curran, Foley Square, New York, New York
Louis Forman, 1540 Broadway, New York, New York
Legal Aid 267 West 17th Street, New York, New York

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975